

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Dixon v Queensland Racing Integrity Commission* [2019] QCAT 58

PARTIES: **TRISTA DIXON**
(applicant)
v
**QUEENSLAND RACING INTEGRITY
COMMISSION**
(respondent)

APPLICATION NO/S: OCR023-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 8 March 2019

HEARING DATE: 15 November 2018

HEARD AT: Brisbane

DECISION OF: Member Kanowski

ORDERS: **1. The Tribunal has jurisdiction to review the internal review decision of the Queensland Racing Integrity Commission dated 18 January 2018.**
2. The application to review a decision is to proceed to a fresh hearing on the merits in the Tribunal's review jurisdiction.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – FUNCTIONS OF TRIBUNALS – where decision of original decision-maker may have been legally ineffective – whether that would affect jurisdiction of tribunal

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 18(1), s 20
Racing Integrity Act 2016 (Qld), s 246

Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338
JM Kelly (Project Builders) Pty Ltd v Queensland Building Services Authority [2013] QCAT 502
Secretary, Department of Social Security v Alvaro (1994) 34 ALD 72
Re Upton and the Department of Transport (1997) 15 ALR 675; [1977] AATA 8
Zubair v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 248

APPEARANCES &
REPRESENTATION:

Applicant: T Ryan instructed by Butler McDermott Lawyers

Respondent: R Oliver

REASONS FOR DECISION

Introduction

- [1] This decision addresses what has been termed a ‘question of jurisdiction’ that has arisen in a review proceeding.
- [2] The main proceeding involves the review of an internal review decision of the Queensland Racing Integrity Commission. The internal reviewer confirmed the decisions of a panel of stewards (or, at least, a panel of persons purporting to be stewards). The panel decided that Mrs Dixon, who is a licensed harness driver, had breached a rule of racing during a race. The panel further decided that Mrs Dixon was to be disqualified from harness driving for 12 months.
- [3] The review by the Tribunal was set down for hearing before Member Allen on 9 August 2018. However, the hearing did not proceed after a ‘question of jurisdiction’ was raised. Member Allen considered that further evidence and submissions were required to properly address that question.
- [4] I conducted an oral hearing on the ‘question of jurisdiction’ on 15 November 2018. Mr Ryan made oral submissions on behalf of Mrs Dixon, and he also relied on his written submissions dated 21 August 2018 and 11 September 2018. Mr Oliver made oral submissions on behalf of the Commission, and he also relied on his written submissions dated 6 September 2018. I reserved my decision. After considering the matter, I sought further written submissions from the parties addressing certain issues. Written submissions were then provided by Mr Ryan dated 8 February 2019 and 22 February 2019. Written submissions dated 8 February 2019 and 26 February 2019 were received from the Commission.
- [5] I have placed the phrase ‘question of jurisdiction’ in quotation marks because neither party submits that the Tribunal lacks jurisdiction. However, the parties’ positions diverge on the nature of the jurisdiction. The divergence stems from certain aspects of the matter when it was still before the Commission. Mr Ryan for Mrs Dixon argues that the Commission has been unable to establish that one of the four persons on the panel of stewards, Mr Daryl Kays, had been appointed as a steward. It follows, Mr Ryan submits, that for this reason alone the decisions affecting Mrs Dixon were invalid and must be quashed. Mr Ryan also submits, in the alternative, that other features would lead to the same result:
- (a) the fact that not all of the stewards were appointed as ‘authorised officers’ under the *Racing Integrity Act 2016* (Qld) (*‘Racing Integrity Act’*);
 - (b) the fact that the internal reviewer was not appointed as an ‘authorised officer’; and

(c) that it has not been established, in Mr Ryan's submission, that the internal reviewer 'holds a more senior office'¹ than the stewards.

[6] In response, the Commission submits that Mr Kays had been appointed as a steward; stewards and the internal reviewer need not be 'authorised officers'; and there is evidence that the internal reviewer holds a more senior office than the stewards. In any event, the Commission submits, even if there was some defect in appointments or processes, the Tribunal nonetheless has jurisdiction and should proceed to determine, on the merits, whether Mrs Dixon breached a rule of racing and, if she did, what penalty is appropriate.

Legislation

[7] The Commission is set up under the *Racing Integrity Act*. One of the Commission's functions is to make decisions about disciplinary matters.² The Commission has power to appoint stewards³ and authorised officers.⁴

[8] Rules of racing are required for each code of racing under Chapter 3 of Part 3 of the *Racing Act 2002* (Qld). The parties have informed me, and I accept, that the *Australian Harness Racing Rules*⁵ have been adopted for harness racing in Queensland. Part 2 of the *Australian Harness Racing Rules* deals with stewards. Stewards are empowered, amongst other things, to determine all matters under question at a race, and to disqualify drivers.⁶ At any race meeting, one steward is to be the chief steward, and the chief steward has a casting as well as a deliberative vote.⁷

[9] I consider that in deciding whether a driver has breached a rule of racing and whether to disqualify a driver, stewards are carrying out a disciplinary function.

[10] A licence holder who is adversely affected by a decision to take disciplinary action relating to their licence may seek review of the decision.⁸ An 'internal review' of the decision is first required.⁹ In an internal review, the Commission must review the original decision and make a decision to either confirm it, amend it, or substitute another decision for it.¹⁰

[11] When the internal review decision has confirmed the original decision, the licence holder may apply to the Tribunal for a review of the internal review decision.¹¹

[12] The Tribunal's review jurisdiction is 'the jurisdiction conferred on the tribunal by an enabling Act to review a decision made or taken to have been made by another entity

¹ *Racing Integrity Act*, s 245(2)(b).

² *Ibid*, s10(1)(j).

³ *Ibid*, Schedule 1.

⁴ *Ibid*, s 145.

⁵ These Rules are said to have been effective from 1 September 1999.

⁶ Rule 15(1)(b), 15(1)(e).

⁷ Rule 14.

⁸ *Racing Integrity Act*, s 240(1)(b), s 241(b)(iv), s 243(1).

⁹ *Ibid*, s 242.

¹⁰ *Ibid*, s245.

¹¹ *Ibid*, s 246.

under that Act'.¹² The decision made by that entity is referred to as the 'reviewable decision'.¹³

- [13] Section 18(1) of the QCAT Act says: 'The tribunal may exercise its review jurisdiction if a person has ... applied to the tribunal to exercise its review jurisdiction for a reviewable decision'.
- [14] The purpose of a review is to 'produce the correct and preferable decision'.¹⁴ The Tribunal must 'hear and decide a review of a reviewable decision by way of a fresh hearing on the merits'.¹⁵ The Tribunal may then confirm the reviewable decision, or amend it, or set it aside and either substitute its own decision or return the matter to the decision-maker with directions.¹⁶

History of the matter

- [15] The race in question was run on 16 December 2017. On the same day, after the race, a panel of stewards (or, at least, a purported panel of stewards) convened and considered whether Mrs Dixon had infringed a rule of racing. The panel consisted of four persons including Mr Kays. The panel part-heard the matter on 16 December 2017 before meeting again on 19 and 22 December 2017. On the last occasion the chairperson announced the panel's decisions: that Mrs Dixon was guilty of the charge of an offence under the *Australian Harness Racing Rules*, and that she was disqualified for 12 months.
- [16] Mrs Dixon then applied for an internal review of the decisions.
- [17] On 18 January 2018 an internal adjudicator of the Commission decided, on internal review (or, at least, purported internal review), to confirm the decisions.
- [18] On 29 January 2018 Mrs Dixon applied to the Tribunal for a review. As I have mentioned, the matter was to have been heard by the Tribunal on 9 August 2018 but the hearing was vacated so that the 'question of jurisdiction' could be decided.

Would a failure in appointment or process before the Commission affect the Tribunal's jurisdiction?

- [19] I do not propose to discuss Mr Ryan's arguments about the Commission's appointments and processes at length. Suffice it to say that it may well be that if some or all of those arguments were accepted, they may establish that the decisions made by the panel of stewards, and/or by the internal reviewer, were legally ineffective.
- [20] However, it is well-established that a merits review tribunal has jurisdiction even when the original decision was not legally effective for one reason or another:

(a) *Re Upton and the Department of Transport* ('Upton');¹⁷

¹² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'), s 17(1).

¹³ *Ibid*, s 17(2).

¹⁴ *Ibid*, s 20(1).

¹⁵ *Ibid*, s 20(2).

¹⁶ *Ibid*, s 24(1).

¹⁷ (1997) 15 ALR 675; [1977] AATA 8.

- (b) *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd* ('*Lawlor*');¹⁸
- (c) *Secretary, Department of Social Security v Alvaro* ('*Alvaro*');¹⁹
- (d) *Zubair v Minister for Immigration & Multicultural & Indigenous Affairs* ('*Zubair*');²⁰
- (e) *JM Kelly (Project Builders) Pty Ltd v Queensland Building Services Authority* ('*JM Kelly*');²¹

- [21] A consistent theme in those cases has been that a purported reviewable decision is sufficient to found jurisdiction in a tribunal, even if it turns out on later analysis that the reviewable decision was legally ineffective.
- [22] The Commission submits that in Mrs Dixon's case the Tribunal should, therefore, proceed to conduct a fresh hearing on the merits. In other words, the Tribunal should hold a hearing to receive evidence and submissions on whether Mrs Dixon breached a rule of racing and, if she did, to determine the appropriate penalty.
- [23] Mr Ryan for Mrs Dixon submits that the cases mentioned in paragraph [20] are distinguishable because none of them involved a purported exercise of power by a person who could never have lawfully made the relevant decision. Instead, Mr Ryan submits, those cases²¹ involved the invalid exercise of powers by persons duly appointed.
- [24] I accept part of that submission. Some of the cases – *Upton*, *Zubair* and *JM Kelly* – involved decisions made by officers or organisations who undoubtedly had power to make the decision in question but who had failed, or allegedly failed, to follow show-cause or similar prerequisite steps. *Lawlor* involved an official cancelling a licence where, it was ultimately found, there was no statutory power to cancel in such circumstances. There had been, though, at least an arguable proposition that the official had an implied power to revoke the licence.
- [25] However, *Alvaro* is in a different category. It involved a decision made by a Department of Social Security officer to recover a debt from a welfare recipient. The officer in question made, or at least had purported to make, the decision on behalf of a person who was a delegate of the Secretary to the Department. The matter then went through an internal review, then an external review by the Social Security Appeals Tribunal, and then a further external review by the Administrative Appeals Tribunal ('AAT'). The AAT decided that the departmental officer had not been authorised to make the decision due to a lack of delegation, and that consequently the AAT lacked jurisdiction.

¹⁸ (1979) 41 FLR 338.

¹⁹ (1994) 34 ALD 72.

²⁰ [2004] FCAFC 248.

²¹ [2013] QCAT 502

[26] So *Alvaro* did involve the question of whether a tribunal has review jurisdiction in circumstances where the original decision-maker lacked authority to make the decision.

[27] In *Alvaro* the Full Federal Court held that the AAT had jurisdiction and remitted the matter to the AAT to decide the application for review of the decision of the Social Security Appeals Tribunal. von Doussa J said:²²

In the hierarchy of reviews from original decision-maker to the AAT it was not necessary that there be at the outset an original decision that was in all respects validly made. The person or tribunal to whom application for each of the reviews was made had jurisdiction to undertake the review so long as the preceding decision-maker had made what purported to be a decision in exercise of powers conferred by the Act affecting the interests of the person seeking review. It mattered not whether the ground of complaint made about the preceding decision was merely that it was wrong on the merits, or that in law it was not an effective decision because it was made by someone without authority, or in excess of authority, or for improper purposes, or was vitiated through procedural irregularity such as a failure to accord natural justice.

The purpose of a review provided for by the Act is to allow the reviewing authority to correct error and substitute a new decision where error is detected.

[28] I can see no reason why the same reasoning would not apply to reviews by QCAT.

[29] In the present case there was, at least, a purported disciplinary decision by a purported panel of stewards, and a decision by a person at least purporting to conduct an internal review under the *Racing Integrity Act*. That is sufficient to give the Tribunal jurisdiction to conduct a review.

[30] Mr Ryan further submits that the Tribunal should decline to exercise its review jurisdiction and, instead, it should ‘quash the original decision’.²³ He argues that this would be consistent with the Tribunal’s statutory objectives,²⁴ and that to continue with a review would be to condone a tainted process.

[31] However, although section 18(1) of the *QCAT Act* says that the Tribunal ‘may exercise its review jurisdiction’ when an application has been made to the Tribunal to exercise that jurisdiction, it has been held that there is actually no discretion involved.²⁵

[32] In any event, it is not apparent what jurisdiction the Tribunal would be exercising in quashing a decision. Such a function would not be within the other two types of jurisdiction – original and appeal – set out in Part 1 of Chapter 2 of the *QCAT Act*.

[33] Further, the Tribunal’s role in its review jurisdiction is to conduct a merits review, not a judicial review.²⁶ Judicial review is concerned with the correctness of the decision

²² *Alvaro*, p 78.

²³ Written submissions dated 8 February 2019, 2[5].

²⁴ *QCAT Act*, s 3.

²⁵ *J M Kelly*, 13[60].

²⁶ *Queensland Building and Construction Commission v Whalley* [2018] QCATA 38, 6[12].

made, the process of decision-making, and the limits of the decision-maker's powers.²⁷

- [34] Mr Ryan drew my attention to *Bell v Townsend and Ors*²⁸ as an example of a court dismissing charges once it was established that the charges had been laid by a person without authority to lay them.
- [35] I accept that there are parallels between criminal and disciplinary proceedings. However, the powers and functions of a tribunal in an administrative review proceeding in a disciplinary matter are not the same as those of a court in a criminal proceeding.
- [36] I accept the submission of the Commission that Mrs Dixon's matter must proceed to a fresh hearing on the merits in the Tribunal's review jurisdiction.
- [37] Whether it could be successfully argued at a merits review hearing, if it were established that the original decision (and/or an intermediate review decision) was made by a person or body without actual authority to make it, that the 'correct and preferable decision' inevitably must be to set aside the reviewable decision, is a question I need not decide. Perhaps it might depend on the nature of the decision, and the nature of the defect. In *Upton*, the AAT set aside a decision to suspend a licence because the original decision-maker had failed to properly follow a show-cause procedure. In contrast, however, in *Zubair* the Full Federal Court held that a similar failure by the original decision-maker when cancelling a visa could be cured in the tribunal proceeding by giving the affected person the opportunity to present their case. Interestingly, in *Alvaro*, von Doussa J devoted several pages to discussing delegations and the circumstances in which a power vested in an official can be exercised by another person without a formal delegation. This discussion seems to have assumed that the AAT on remittal might again wish to consider whether the original decision-maker had authority to decide to recover the debt, rather than the AAT simply forming its own view on whether the statutory requirements for recovering a debt were satisfied.
- [38] As the matter is not before me for a final hearing, I will not attempt to resolve whether questions of appointments and processes before the Commission could be relevant, or even determinative, in a merits review.

Conclusion

- [39] The Tribunal has jurisdiction, and the matter should proceed to a hearing on the merits.

²⁷ Ibid.

²⁸ [2014] QMC 30.